310–39032 thru 310R2140
320 thru 320F
320–0001 thru 320F0045
335
335–0001 thru 335–0065
340 thru 340A
340–0001 thru 340A1543
401 thru 401B
401–0001 thru 401B0221
402 thru 402C
402–0001 thru 402C0653
404
404–0001 thru 404–0859
411 thru 411A
411–0001 thru 411A0300
414 thru 414A
414–0001 thru 414A0858
421 thru 421C
421–0001 thru 421C1257

Compliance: Required as indicated in the body of the AD, unless already accomplished.

To preclude misfueling of the airplane resulting in engine failure, accomplish the following:

(a) Within the next 12 calendar months after the effective date of this AD, unless already accomplished, modify all fuel filler opening(s) in accordance with the instructions contained in Cessna Service Information Letter ME84–31 dated July 20, 1984.

(b) Airplanes may be flown in accordance with FAR 21.197 to a location where this AD may be accomplished.

(c) In accordance with FAR Part 43, Appendix A, Item (c) 29, the modifications required by this AD [except installation of the SK303–29 kit] are preventative maintenance and may be performed by the holder of a pilot certificate issued under FAR Part 61 on airplanes owned or operated by him subject to the limitations of FAR 43.3(g). The maintenance record entries required by FAR 43.9 and FAR 91.173 must be accomplished.

(d) An equivalent means of compliance with this AD may be used if approved by the Manager, Wichita Aircraft Certification Office, Federal Aviation Administration, 1801 Airport Road, Room 100, Wichita, Kansas 67209.

All persons affected by this directive may obtain copies of the document(s) referred to herein upon request to Cessna Aircraft Company, Customer Services, Post Office Box 1521, Wichita, Kansas 67201; or the FAA, Rules Docket, Office of the Regional Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

This amendment becomes effective on November 2, 1987.

Issued in Kansas City, Missouri, on September 17, 1987.

Jerold M. Chavkin,

Acting Director, Central Region.

[FR Doc. 87–22719 Filed 10–1–87; 8:45 am]

BILLING CODE 4910–13–M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 275 and 279

[Rel. No. IA–1083; File No. S7–24–86]

Financial and Disciplinary Information That Investment Advisers Must Disclose to Clients

AGENCY: Securities and Exchange Commission.

ACTION: Adoption of rule.

SUMMARY: The Commission is adopting a rule under the Investment Advisers Act of 1940 to codify an investment adviser's fiduciary obligation to disclose material financial and disciplinary information to clients. The rule sets forth the general disclosure obligation and provides guidance on disciplinary information required to be disclosed. The rule is intended to help ensure that clients receive information material to their decision whether to hire or continue to engage an adviser.

EFFECTIVE DATE: December 1, 1987.

FOR FURTHER INFORMATION CONTACT: Debra Kertzman, Attorney, or Robert E. Plaze, Special Counsel, Office of Disclosure and Adviser Regulation, (202) 272–2107, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission ("Commission") today is adopting Rule 206(4)–4 under the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 *et seq.*] ("Advisers Act"). The rule, which was proposed for public comment on September 19, 1986,[1] codifies the Commission's interpretation that section 206 of the Advisers Act [15 U.S.C. 80b–6] requires (1) advisers with custody or discretionary authority over client funds or securities or who require substantial prepayment of advisory fees to disclose precarious financial conditions to clients, and (2) all advisers to disclose material disciplinary events to clients. In addition, the rule specifies certain legal or disciplinary events (referred to hereafter as "disciplinary events") involving the adviser or key advisory personnel as presumptively material. While providing guidance on the types of material disciplinary information required to be disclosed, the rule makes clear that additional disclosure may be required under the Advisers Act.

[1] Investment Advisers Act Rel. No. 1035 (September 19, 1986) [51 FR 34229 (September 26, 1986)].

Discussion

Section 206 of the Advisers Act prohibits investment advisers from engaging in fraudulent and deceptive acts and practices and provides the Commission with rulemaking authority to define and prescribe means reasonably designed to prevent such acts and practices.[2] Fraudulent and deceptive acts and practices under section 206 include the failure to disclose certain facts.[3] The Commission proposed Rule 206(4)–4 to remind advisers of their obligation to disclose to clients material facts about precarious financial conditions and certain disciplinary events, and to provide guidance on some of the disciplinary events required to be disclosed.

Thirty-one comments were received on the proposed rule.[4] Most commenters supported the general purpose of the rule. Many, however, suggested modifications to either clarify the disclosure obligation under the rule or narrow its scope. After reviewing the comments, the Commission has decided to adopt the rule with several modifications. Rule 206(4)–4, as adopted: (1) Limits the requirement to disclose precarious financial conditions to advisers with custody or discretionary authority over client funds or securities, or that require substantial prepayment of advisory fees, (2) requires all advisers to disclose material disciplinary events to clients, and (3) sets forth those disciplinary events that are presumptively material.

1. Financial Information

As proposed, paragraph (a)(1) of the rule would require all advisers to disclose to clients material facts with respect to a financial condition of the adviser that is reasonably likely to impair the adviser's ability to meet contractual commitments to clients ("precarious financial conditions").

[2] Section 206 of the Advisers Act, in relevant part, states that: It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly: (1) to employ any device, scheme, or artifice to defraud any client or prospective client; (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client; * * * (4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

[3] *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 198 (1963).

[4] File No. S7–24–86 contains these public comment letters as well as a summary of comments prepared by the Commission staff.

Fourteen commenters recommended limiting financial disclosures under the rule to advisers that either have custody of client assets or require substantial prepayment of advisory fees.[5] These commenters stated that an adviser's financial condition is material to a client or prospective client only when client assets or prepaid services may be jeopardized.[6]

The Commission agrees that the financial condition of all advisers may not be material to their clients and has modified the rule accordingly. As adopted, the rule requires only those advisers with custody or discretionary authority [7] over client funds or securities, or that require prepayment of advisory fees of more than $500 per client and six months or more in advance, to disclose a precarious financial condition to clients.[8] Several commenters urged the Commission not to impose this financial disclosure obligation on advisers solely because they have discretionary authority over client assets. They asserted that a client's decision whether to hire an adviser and give it discretionary authority is due primarily to the services the adviser is able to provide, rather than the adviser's financial background. The Commission believes, however, that this information is material to these clients and should be disclosed because of the risk of investment loss resulting from the disruption or discontinuance of active investment management.[9]

[5] These are the circumstances under which an adviser must include a balance sheet in Part II of its Form ADV [17 CFR 279.1]. Form ADV is the registration form for investment advisers. Part II of which specifies disclosures to clients and prospective clients required by Rule 204–3 under the Advisers Act [17 CFR 275.204–3] ("brochure rule").

[6] In addition, several of these commenters requested the Commission to clarify what constitutes a "financial condition reasonably likely to impair the adviser's ability to meet contractual commitments to clients" under the rule. Such a determination is inherently factual in nature but, as noted by two commenters, would generally include insolvency or bankruptcy.

[7] "Discretionary authority" under the rule includes both express and implied discretionary authority. *See Follansbee v. Davis, Skaggs & Co., Inc.*, 681 F.2d 673 (9th Cir. 1982); *Carras v. Burns*, 516 F.2d 215 (4th Cir. 1975).

[8] Under the rule, advisers required to disclose a precarious financial condition need only make such disclosures to those clients over whose securities they have custody or discretionary authority, or from whom they accept substantial prepayment of advisory fees, and not to other clients.

[9] The risk of investment loss is especially acute where the client's portfolio requires constant supervision because it contains volatile, high risk investments, or where clients, such as an investment company or a pension plan, must overcome legal hurdles (shareholder votes, etc.,) to replace the adviser.

2. Material Disciplinary Information

Paragraph (a)(2) of the proposed rule would require an adviser to disclose material facts about any disciplinary event material to an evaluation of the adviser's integrity or ability to meet contractual commitments to clients. Paragraph (b) of the proposed rule defined certain disciplinary events involving the adviser or its management persons and occurring within the past ten years as material.

A number of commenters urged the Commission to revise this paragraph to narrow the definition of material disciplinary events. They stated that this provision of the rule would require advisers to disclose information that they believed to be immaterial. For example, several commenters argued that the rule would require disclosure of a violation of a technical state insurance regulation by an insurance holding company parent of an adviser, although such a violation might not be material to a client's evaluation of the advisory subsidiary's integrity or ability to meet contractual commitments to clients.

Because of these commenters' concerns, the Commission has decided to substantially modify paragraph (b). As adopted, paragraph (b) creates a rebuttable presumption of materiality rather than a determination of materiality. The Commission acknowledges that there are circumstances where some of the disciplinary events set forth in paragraph (b) may not be material to clients. This may be due to differences in the size and organizational structure of an adviser, the broad range of investment-related laws, and/or the length of time which has passed since the disciplinary event occurred.

One option some commenters suggested, and the Commission considered, would be to simply codify the general duty to disclose material disciplinary events and allow case law to determine which events are material and thus required to be disclosed. However, the Commission believes that it is desirable to provide advisers with guidance in complying with their disciplinary disclosure obligation under Section 206. By creating a presumption of materiality, Rule 206(4)–4 will provide this guidance while preserving flexibility for advisers able to rebut the presumption based upon a particular fact situation. To determine whether a disciplinary event falling within the terms of paragraph (b) overcomes the presumption of materiality, an adviser should carefully weigh each of the following four factors: the distance of the entity or individual involved in the disciplinary event from the advisory function, the nature of the infraction that led to the disciplinary event, the severity of the disciplinary sanction, and the time elapsed since the date of the disciplinary event. While there may be particular instances where a single factor is dispositive, all four factors should be considered because in most instances no single factor will be controlling.

a. Pending Criminal Proceedings

Paragraph (b), as proposed, would define certain civil and criminal court actions, agency proceedings, and self-regulatory organization ("SRO") proceedings as material disciplinary events.[10] Included within the definition of material court actions were pending criminal proceedings relating generally to fraud or theft. Several commenters urged the Commission not to define pending criminal proceedings as material disciplinary events under the rule because this would, in their opinion, have the effect of imposing a penalty on the adviser before a finding of guilt is made or, if the case is ultimately dismissed or a finding of innocence is made, unfairly penalize the adviser. The rule has not been modified in this respect. The Commission believes that a pending criminal proceeding against an adviser or its management person is material and should be disclosed because it reflects upon the degree of trust and confidence clients would place in their adviser. Moreover, the requirement to disclose pending criminal proceedings is no different than the disclosure required of directors and executive officers of companies issuing securities,[11] registrants in their annual

[10] The Commission has modified the definition of "investment-related" in paragraph (d)(3) of the rule to conform to the 1986 amendments to section 203(e)(2)(B) of the Advisers Act [15 U.S.C. 80b-3(e)(2)]. Pub. L. 99–571, section 101, 100 Stat. 3208, 3220 (1986). The amendments expanded the circumstances under which an adviser could be disqualified from registration to include felony or misdemeanor convictions involving government securities brokers or dealers or entities or persons required to register under the Commodity Exchange Act [17 U.S.C. 1 *et seq.*].]

[11] *See* Item 11 of Form S–1 [17 CFR 239.11]; Item 18 of Form S–4 [17 CFR 239.25]; Item 21 of Form S–11 [17 CFR 259.18]; Item 10 of Form S–18 [17 CFR 239.28]; Item 9 of Form N–1A [17 CFR 274.11A]; Item 10 of Form N–2 [17 CFR 274.11a-1]; Item 13 of Form N–3 [17 CFR 274.11b]; Item 13 of Form N–4 [17 CFR 274.11c]; Item 6 of Form N–5 [17 CFR 274.5]; and Item 17 of Form N–8B–4 [17 CFR 274.14].

or semi-annual reports,[12] persons soliciting proxies,[13] or persons making a tender offer.[14]

b. Management Persons

Paragraph (b), as adopted, requires disclosure of disciplinary events involving the adviser or its management persons. As defined in paragraph (d), management persons include any person with the power to exercise, directly or indirectly, a controlling influence over the management or policies of an adviser or to determine the general investment advice given to clients. Seven commenters urged the Commission to narrow this definition, asserting it would include too many persons or entities not directly involved in giving investment advice, particularly in the context of a large diversified financial firm. The adoption of the presumptive materiality standard in paragraph (b) effectively limits the breadth of the definition of management person. As discussed above, the distance of the entity or person involved in the disciplinary event from the advisory function is one factor in determining whether the presumption of materiality of a disciplinary event listed under paragraph (b) may be overcome.

One commenter asked the Commission to clarify whether an adviser would have to disclose the disciplinary history of a person no longer employed or affiliated with the investment advisory firm. Under the definition of "management person," an adviser is only required to disclose the disciplinary history of persons currently employed or affiliated with it, regardless of whether the disciplinary event occurred prior to the person's employment or affiliation with the adviser.

c. Time Period

Paragraph (b) of the proposed rule would define certain disciplinary events as material unless more than ten years had elapsed from the time of the event. This ten-year period is based upon the time period specified in section 203(e)(2) of the Advisers Act [15 U.S.C. 80b-3(e)(2)][15] and Item 11 of Form ADV.[16] In the proposing release, the Commission requested comment on whether a different time period should be used, such as the five-year period specified in Item 401(f) of Regulation S-K [17 CFR 229.401(f)].[17]

Several commenters urged the Commission to reduce the time period from ten to five years. According to these commenters, reducing the time period would not eliminate the adviser's obligation to disclose disciplinary events occurring before a five-year period, because paragraph (e) of the rule states that the period specified in paragraph (b) is only a minimum disclosure requirement.

The Commission has decided to adopt the rule with a ten-year period to measure the presumptive materiality of disciplinary events. Because section 203(e)(2) of the Advisers Act reflects a congressional determination that the materiality of disciplinary events involving investment advisers extends back, at a minimum, to events occurring within a ten-year period, a ten-year period is appropriate. The length of this period is mitigated somewhat by the presumptive materiality standard in paragraph (b). As previously discussed, the amount of time that has elapsed is one factor in determining whether the presumption of materiality of a disciplinary event listed under paragraph (b) may be overcome.

Thus, under the rule, disciplinary events involving the adviser or its management person occurring within the ten-year period may, under certain circumstances, not be material to clients and would not have to be disclosed.

3. Integration with Form ADV

Finally, eight commenters recommended that the Commission integrate the disclosure required under Rule 206(4)-4 into Part II of Form ADV (the "brochure"). Use of the brochure to comply with Rule 206(4)-4 would, in their view, make compliance for registered advisers easier and less expensive than a separate disclosure document. The Commission agrees with these commenters and has added a note to Rule 206(4)-4 and an instruction to Form ADV stating that advisers may use their brochure to make the required disclosures,[18] provided that the timing of disclosure provision in paragraph (c) of Rule 206(4)-4 is satisfied.[19]

Regulatory Flexibility Act Analysis

A summary of the Initial Regulatory Flexibility Act Analysis, which the Commission prepared in accordance with 15 U.S.C. 603, regarding proposed Rule 206(4)-4 was published in Investment Advisers Act Release No. 1035. No comments were received on this analysis. The Commission has prepared a Final Regulatory Flexibility Analysis, a copy of which may be obtained by contacting Debra J. Kertzman, Esq., Division of Investment Management, Securities and Exchange Commission, 450 5th Street NW., Washington, DC 20549, (202) 272-2107.

Statutory Authority

The Commission is adopting Rule 206(4)-4 and the instruction of Form ADV under the authority set forth in sections 204, 206(4), and 211(a) of the Advisers Act [15 U.S.C. 80b-4, 80b-6(4) and 80b-11(a)].

List of Subjects in 17 CFR Parts 275 and 279

Investment adviser, Fraud, Securities.

Text of Rule

Parts 275 and 279 of Chapter II of Title 17 of the Code of Federal Regulations is amended as shown:

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

1. The authority citation for Part 275 continues to read as follows:

Authority: Sec. 203, 54 Stat. 850, as amended, 15 U.S.C. 80b-3; sec. 204, 54 Stat. 852, as amended, 15 U.S.C. 80b-4; Sec. 206A, 84 Stat. 1433, as added, 15 U.S.C. 80b-6A; sec. 211, 54 Stat. 855, as amended, 15 U.S.C. 80b-11.

2. By adding § 275.206(4)-4 as follows:

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[12] *See* 10 of Form 10-K [17 CFR 249.310]; and sub-item 77e of Form N-SAR [17 CFR 274.101]. *Cf.* Item 11 of Form ADV [17 CFR 279.1].

[13] *See* Item 7 of Schedule 14A [17 CFR 240.14a-10]. *See also* Item 1 of Schedule 14C [17 CFR 240.14C-101] with respect to issuers transmitting information statements.

[14] *See* Item 2 of Schedule 14D-1 [17 CFR 240.14d-100].

[15] Section 203(e)(2) sets forth a list of disciplinary events involving an adviser which can be used to deny, suspend, or revoke an adviser's registration. *See also* Rule 206(4)-3(a)(1) [17 CFR 275.206(4)-3(a)(1)] which prohibits registered investment advisers from using solicitors that have been convicted during the previous ten years of any felony or misdemeanor involving conduct described in section 203(e) of the Advisers Act.

[16] The ten-year period is the minimum disclosure period for disciplinary events in Item 11 of Part I of Form ADV.

[17] Item 401(f) requires issuers to disclose material legal proceedings involving management of the issuer.

[18] One commenter suggested that the Commission allow "insolvent" advisers to give clients a balance sheet to comply with the financial disclosure requirements of Rule 206(4)-4. Under the rule, inclusion of an audited balance sheet in the brochure would not be sufficient to disclose a precarious financial condition: an affirmative statement disclosing such a condition is required.

[19] Under Rule 204-3, registered advisers are required only to offer to deliver a brochure to existing clients. In contrast, under Rule 206(4)-4 disclosure of precarious financial conditions and material disciplinary events must be made promptly to clients.

§ 275.206(4)-4 Financial and disciplinary information that investment advisers must disclose to clients.

(a) It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act for any investment adviser to fail to disclose to any client or prospective client all material facts with respect to:

(1) A financial condition of the adviser that is reasonably likely to impair the ability of the adviser to meet contractual commitments to clients, if the adviser has discretionary authority (express or implied) or custody over such client's funds or securities, or requires prepayment of advisory fees of more than $500 from such client, 6 months or more in advance; or

(2) A legal or disciplinary event that is material to an evaluation of the adviser's integrity or ability to meet contractual commitments to clients.

(b) It shall constitute a rebuttable presumption that the following legal or disciplinary events involving the adviser or a management person of the adviser (any of the foregoing being referred to hereafter as "person") that were not resolved in the person's favor or subsequently reversed, suspended, or vacated are material within the meaning of paragraph (a)(2) of the rule for a period of 10 years from the time of the event:

(1) A criminal or civil action in a court of competent jurisdiction in which the person—

(i) Was convicted, pleaded guilty or nolo contendere ("no contest") to a felony or misdemeanor, or is the named subject of a pending criminal proceeding (any of the foregoing referred to hereafter as "action"), and such action involved: an investment-related business; fraud, false statements, or omissions; wrongful taking of property; or bribery, forgery, counterfeiting, or extortion;

(ii) Was found to have been involved in a violation of an investment-related statute or regulation; or

(iii) Was the subject of any order, judgment, or decree permanently or temporarily enjoining the person from, or otherwise limiting the person from, engaging in any investment-related activity.

(2) Administrative proceedings before the Securities and Exchange Commission, and other federal regulatory agency or any state agency (any of the foregoing being referred to hereafter as "agency") in which the person—

(i) Was found to have caused an investment-related business to lose its authorization to do business; or

(ii) Was found to have been involved in a violation of an investment-related statute or regulation and was the subject of an order by the agency denying, suspending, or revoking the authorization of the person to act in, or barring or suspending the person's association with, an investment-related business; or otherwise significantly limiting the person's investment-related activities.

(3) Self-Regulatory Organization (SRO) proceedings in which the person—

(i) Was found to have caused an investment-related business to lose its authorization to do business; or

(ii) Was found to have been involved in a violation of the SRO's rules and was the subject of an order by the SRO barring or suspending the person from membership or from association with other members, or expelling the person from membership; fining the person more than $2,500; or otherwise significantly limiting the person's investment-related activities.

(c) The information required to be disclosed by paragraph (a) shall be disclosed to clients promptly, and to prospective clients not less than 48 hours prior to entering into any written or oral investment advisory contract, or no later than the time of entering into such contract if the client has the right to terminate the contract without penalty within five business days after entering into the contract.

(d) For purposes of this rule:

(1) "Management person" means a person with power to exercise, directly or indirectly, a controlling influence over the management or policies of an adviser which is a company or to determine the general investment advice given to clients.

(2) "Found" means determined or ascertained by adjudication or consent in a final SRO proceeding, administrative proceeding, or court action.

(3) "Investment-related" means pertaining to securities commodities, banking, insurance, or real estate (including, but not limited to, action as or being associated with a broker, dealer, investment company, investment adviser, government securities broker or dealer, municipal securities dealer, bank, savings and loan association, entity or person required to be registered under the Commodity Exchange Act [7 U.S.C. 1 *et seq.*], or fiduciary).

(4) "Involved" means acting or aiding, abetting, causing, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act.

(5) "Self-Regulatory Organization" or "SRO" means any national securities or commodities exchange, registered association, or registered clearing agency.

(e) For purposes of calculating the 10-year period during which events are presumed to be material under paragraph (b), the date of a reportable event shall be the date on which the final order, judgment, or decree was entered, or the date on which any rights of appeal from preliminary orders, judgments, or decrees lapsed.

(f) Compliance with paragraph (b) of this rule shall not relieve any investment adviser from the disclosure obligations of paragraph (a) of the rule; compliance with paragraph (a) of the rule shall not relieve any investment adviser from any other disclosure requirement under the Act, the rules and regulations thereunder, or under any other federal or state law.

Note: Registered investment advisers may disclose this information to clients and pospective clients in their "brochure," the written disclosure statement to clients under Rule 204-3 [17 CFR 275.204-3]; *provided*, that the delivery of the brochure satisfies the timing of disclosure requirements described in paragraph (c) of this rule.

PART 279—FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

1. The authority citation for Part 279 continues to read as follows:

Authority: The Investment Advisers Act of 1940, 15 U.S.C. 80b-1, *et seq.*

2. By amending instruction 1 to Form ADV, which is described in § 279.1, by adding a new sub-paragraph.

§ 279.1 Form ADV, for Application for Registration of Investment Adviser and for Amendment to Such Registration Statement.

Instruction to Form ADV

1. This is a Uniform Form for use by investment advisers to:

* * * * *

• Comply with their obligation under SEC Rule 206(4)-4 to disclose material financial and disciplinary information to clients. When using Part II of this form to disclose this information to clients, advisers must satisfy the timing of disclosure requirements described in paragraph (c) of SEC Rule 206(4)-4. Note that SEC Rule 206(4)-4(c) requires an adviser to disclose this information promptly to clients, while SEC Rule 204-3(b) only requires an adviser to annually offer to deliver its brochure to existing clients.

* * * * *

By the Commission.
September 25, 1987.
Shirley E. Hollis,
Assistant Secretary.
[FR Doc. 87-22702 Filed 10-1-87; 8:45 am]
BILLING CODE 8010-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 2 and 284

[Docket No. RM87-34-000]

Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol

Issued: September 28, 1987.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Interim rule; order granting rehearing solely for purposes of further consideration.

SUMMARY: The Federal Energy Regulatory Commission is granting rehearing of Order No. 500 solely for the purpose of affording sufficient time to consider the numerous issues raised in the forty-four requests for rehearing which have been filed. This action does not constitute a grant or denial of rehearing, either in whole or in part.

EFFECTIVE DATE: September 28, 1987.

FOR FURTHER INFORMATION CONTACT: Richard Howe, Jr., Office of General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, (202) 357-8274.

SUPPLEMENTARY INFORMATION:

[Docket Nos. RM87-34-001 through RM87-34-045]

Order Granting Rehearing Solely for Purposes of Further Consideration

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

On August 7, 1987, the Federal Energy Regulatory Commission issued Order No. 500[1] responding on an interim basis to the decision of the United States Court of Appeals for the District of Columbia Circuit concerning Order No. 436 in *Associated Gas Distributors v. FERC.*[2] On August 28 and September 3, 4, and 8, 1987, the Commission received forty-four timely requests for rehearing of Order No. 500.

In order to afford sufficient time to consider the numerous issues raised in the rehearing requests, it is necessary to grant rehearing of Order No. 500 for the limited purpose of further consideration.

The Commission orders:

Rehearing of Order No. 500 is hereby granted for the limited purpose of further consideration. This action does not constitute a grant or denial of rehearing, either in whole or in part. As provided in § 385.713(d) of the Commission's Rules of Practice and Procedure, no answers to the requests for rehearing will be entertained by the Commission.

By the Commission.
Kenneth F. Plumb,
Secretary.
[FR Doc. 87-22819 Filed 10-1-87; 8:45 am]
BILLING CODE 6717-01-M

[1] 52 FR 30334 (August 14, 1987).
[2] No. 85-1811 (D.C. Cir. June 24, 1987).

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Parts 230, 633, and 635

Required Contract Provisions

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: The FHWA is amending regulations pertaining to required contract provisions for Federal-aid construction contracts. The purpose of this final rule is to eliminate duplicative provisions of 23 CFR Part 633 that merely restate requirements contained in other existing regulations. This consists of removing the text of Form PR-1273, Required Contract Provisions, from the Appendix to Part 633 and amending Part 635 to include several requirements which were previously addressed only in the Appendix to Part 633. Form PR-1273 is essentially a convenient collection of contract provisions already required by regulations promulgated by the Federal Highway Administration (FHWA) and other Federal agencies. This action is intended to eliminate the need to amend the regulation through repetitive rulemaking procedures each time the form is revised to incorporate a new or amended requirement duly promulgated by the responsible agency.

EFFECTIVE DATE: This final rule is effective October 2, 1987.

FOR FURTHER INFORMATION CONTACT: Mr. William A. Weseman, Chief, Construction and Maintenance Division, (202) 366-0392, or Mr. Paul Brennan, Office of Chief Counsel, (202) 366-1394, Federal Highway Administration, 400 Seventh Street SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., E.T., Monday through Friday.

SUPPLEMENTARY INFORMATION: The regulations currently contained in 23 CFR Part 633, Subpart A require certain contract provisions to be incorporated in each highway construction contract that involves the expenditure of Federal funds (other than direct Federal and Appalachian construction contracts). These provisions which are set forth in Appendix A of the regulation, contain the conditions attached to participation of Federal funds and are imposed under authority administered by the FHWA and several other Federal agencies.

Since Appendix A primarly restates requirements contained in regulations promulgated by the Environmental Protection Agency, Department of Labor, Department of Transportation (DOT), or Office of Management and Budget (OMB), the FHWA has determined that it is an unnecessary procedural burden to revise 23 CFR Part 633 by rulemaking whenever the substantive regulations are revised or amended by the responsible agencies. In order to reduce this paperwork burden and to eliminate the redundancy of regulations, Appendix A, Required Contract Provisions, is being removed from Title 23 of the CFR.

To ensure that all conditions of Federal-aid contracts continue to be authorized pursuant to regulation, it is necessary to amend 23 CFR Part 635 to include the following existing requirements which were previously addressed only in 23 CFR Part 633 and Appendix A: provisions for termination of contract, provisions for subcontracting, provisions for final certification of a project concerning wages and labor classifications, and provisions for record of materials, supplies, and labor. Relative to the record of material, supplies, and labor, the FHWA is also increasing the reporting threshold for the submission of Form PR-47, "Statement of Materials and Labor Used by Contractor of Highway Construction Involving Federal Funds" from $500,000 to $1,000,000 for final construction cost for roadway and bridge projects. This change to the reporting threshold will reduce the burden of data collection on contractors and result in only minor changes in the reported construction usage factors.

In the future, the Required Contract Provisions, presently designated as Form PR-1273, will be redesignated as Form FHWA-1273 and distributed periodically through FHWA's division offices located in each State. This process will keep the contract

provisions current with the underlying regulatory requirements.

The following table sets forth the source regulation for each provision contained within redesignated Form FHWA–1273.

Provision table	Regulation reference
1. Nondiscrimination	41 CFR Part 60 49 CFR Part 21
2. Nonsegregated Facilities	41 CFR Part 41
3. Payment of Predetermined Minimum Wage.	29 CFR Parts 1, 3, and 5
4. Statement and Payrolls	29 CFR Parts 3 and 5
5. Record of Materials, Supplies, and Labor.	23 CFR Part 635
6. Subletting or Assigning the Contract.	23 CFR Part 635
7. Safety: Accident Prevention.	23 CFR Part 635
8. False Statements Concerning Highway Projects.	23 CFR Part 635
9. Implementation of Clear Air Act and Federal Water Pollution Control Act.	40 CFR Part 15

The FHWA has determined that this action does not contain a major rule under Executive Order 12291 or a significant regulation under the regulatory policies and procedures of the DOT. It is anticipated that the economic impact of this rulemaking will be minimal, since the FHWA is merely eliminating duplicative procedures and is making no substantive changes. The procedural and editorial revisions in this document will eliminate repetitive efforts and simplify the contract solicitation and award process. Accordingly, a separate regulatory evaluation is not required.

For the foregoing reasons and under the criteria of the Regulatory Flexibility Act, it is certified that this action will not have a significant economic impact on a substantial number of small entities.

With regard to the information collection requirements contained in this regulation, the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq., Pub. L. 96–511) has assigned the control numbers of 1215–0140 and 2125–0033. These recordkeeping requirements are mainly attributable to requirements imposed by regulations issued by the Department of Labor and the Department of Transportation (Office of the Secretary).

The procedural elimination and editorial revisions impose no additional burdens on the States or the construction industry. For these reasons, the FHWA finds good cause to make this regulation effective without prior notice and opportunity for comment and without a 30-day delay in effective date. Furthermore, neither a general notice of proposed rulemaking nor a 30-day delay in effective date is required under the Administrative Procedure Act because the matters affected relate to grants, benefits, or contracts pursuant to 5 U.S.C. 553(a)(2). Accordingly, this regulation is effective upon publication.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program)

List of Subjects in 23 CFR Parts 230, 633, and 635

Grant programs—transportation, Government contracts, Highways and roads, Reporting requirements.

Issued on: September 18, 1987.

R.A. Barnhart,

Federal Highway Administrator, Federal Highway Administration.

The FHWA is amending 23 CFR Parts 230, 633, and 635 as follows:

1. In consideration of the foregoing, the FHWA hereby amends Chapter I of Title 23, Code of Federal Regulations, Part 633, by revising Subpart A, consisting of §§ 633.101–633.104, as set forth below.

PART 633—REQUIRED CONTRACT PROVISIONS

Subpart A—Federal-Aid Construction Contracts (Other Than Appalachian Contracts)

Sec.

Authority: 23 U.S.C. 114 and 315; 49 CFR 1.48.

Subpart A—Federal-Aid Construction Contracts (Other Than Appalachian Contract)

§ 633.101 Purpose.

To prescribe for Federal-aid highway proposals and construction contracts the method for inclusion of required contract provisions of existing regulations which cover employment, nonsegregated facilities, record of materials and supplies, subletting or assigning the contract, safety, false statements concerning highway projects, termination of a contract, and implementation of the Clean Air Act and the Federal Water Pollution Control Act, and other provisions as shall from time-to-time be required by law and regulation as conditions of Federal assistance.

§ 633.102 Applicability.

(a) The required contract provisions and the required proposal notices apply to all Federal-aid construction contracts other than Appalachian construction contracts.

(b) Form FHWA–1273, "Required Contract Provisions, Federal-aid Construction Contracts," contains required contract provisions and required proposal notices that are required by regulations promulgated by the FHWA or other Federal agencies. The required contract provisions of Form FHWA–1273 shall be physically incorporated in each Federal-aid highway construction contract other than Appalachian construction contracts (see § 633.104 for availability of form).

(c) For contracts authorized under certification acceptance procedures, an alternate format for inclusion of required contract provisions may be used pursuant to 23 CFR Part 640.

(d) The required contract provisions contained in Form FHWA–1273 shall apply to all work performed on the contract by the contractor's own organization and to all work performed on the contract by piecework, station work, or by subcontract.

(e) The contractor shall insert in each subcontract, except as excluded by law or regulation, the required contract provisions contained in Form FHWA–1273 and further require their inclusion in any lower tier subcontract that may in turn be made. The required contract provisions of Form FHWA–1273 shall not be incorporated by reference in any case. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the requirements contained in the provisions of Form FHWA–1273.

(f) The State highway agency (SHA) shall include the notices concerning certification of nonsegregated facilities and implementation of the Clean Air Act and Federal Water Pollution Control Act, pursuant to 40 CFR Part 15, in all bidding proposals for Federal-aid highway construction projects. As the notices are reproduced in Form FHWA–1273, the SHA may include Form FHWA–1273 in its entirety to meet this requirement.

§ 633.103 Regulatory authority.

All required contract provisions contained in Form FHWA–1273 are requirements of regulations promulgated by the FHWA or other Federal agencies.The authority for each provision will be cited in the text of Form FHWA–1273.

§ 633.104 Availability.

(a) Form FHWA–1273 will be maintained by the FHWA and as regulatory revisions occur, the form will be updated.

(b) Current copies of Form FHWA–1273, Required Contract Provisions, will be made available to the SHAs by the FHWA.

PART 635—CONSTRUCTION AND MAINTENANCE

Subpart A—Contract Procedures

2. The authority citation for Part 635 is revised to read as follows:

Authority: 23 U.S.C. 112, 113, 114, 117, 128 and 135; 31 U.S.C. 6506; 42 U.S.C. 3334, 4601 *et seq.*; 49 CFR 1.48(b).

3. Part 635 is amended by revising §§ 635.113 and 635.126 and by adding §§ 635.129 and 635.130 to read as follows:

§ 635.113 Subcontracting.

(a) Contracts for projects shall specify the minimum percentage of work that a contractor must perform with its own organization. This percentage shall be not less than 30 percent of the total original contract price excluding any identified specialty items. Specialty items may be performed by subcontract and the amount of any such specialty items so performed may be deducted from the total original contract price before computing the amount of work required to be performed by the contractor's own organization. The contract amount upon which the above requirement is computed includes the cost of materials and manufactured products which are to be purchased or produced by the contractor under the contract provisions.

(1) "Its own organization" shall be construed to include only workers employed and paid directly by the prime contractor and equipment owned or rented by the prime contractor, with or without operators. Such term does not include employees or equipment of a subcontractor, assignee, or agent of the prime contractor.

(2) "Specialty Items" shall be construed to be limited to work that requires highly specialized knowledge, abilities, or equipment not ordinarily available in the type of contracting organizations qualified and expected to bid on the contract as a whole and in general are to be limited to minor components of the overall contract.

(b) Upon the request of an SHA, the requirements of paragraph (a) of this section may be modified in whole or in part by the FHWA to such extent as the FHWA determines to be in the public interest.

(c) The SHA shall not permit any of the contract work to be performed under a subcontract, unless such arrangement has been authorized by the SHA in writing. Prior to authorizing a subcontract, the SHA shall assure that each subcontract is evidenced in writing and that it contains all pertinent provisions and requirements of the prime contract.

(d) To assure that all work is performed in accordance with the contract requirements, the contractor shall be required to furnish (1) a competent superintendent or supervisor who is employed by the firm, has full authority to direct performance of the work in accordance with the contract requirements, and is in charge of all construction operations (regardless of who performs the work) and (2) such other of its own organizational resources (supervision, management, and engineering services) as the SHA contracting officer determines is necessary to assure the performance of the contract.

§ 635.126 Termination and default of contract.

(a) All contracts exceeding $10,000 shall contain suitable provisions for termination by the State, including the manner by which the termination will be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(b) When a Federal-aid contract is terminated by the SHA, the extent of Federal-aid participation in the contract costs, including final settlement, will depend upon the merits of the individual case. In no event will Federal funds participate in any allowance for anticipated profit on work not performed.

(c) Normal Federal-aid plans, specifications, and estimates, advertising, and award procedures are to be followed when an SHA awards the contract for completion of a defaulted or previously terminated Federal-aid contract. Under this procedure, the construction amount eligible for Federal participation on the project should not exceed either:

(1) The amount representing the payments made under the original contract plus payments made under the new contract or

(2) The amount representing what the cost would have been if the construction had been completed as contemplated by the plans and specifications under the original contract, whichever amount is the lesser.

(d) If the surety awards a contract for completion of a defaulted Federal-aid contract or completes it by some other acceptable means, the FHWA would then consider the terms of the original contract to be in effect and that the work will be completed in accordance with the approved plans and specifications included therein. No further FHWA approval or concurrence action will therefore be needed in connection with any defaulted Federal-aid contract awarded by a surety. Under this procedure, the construction amount eligible for Federal participation on the project should not exceed the amount representing what the cost would have been if the construction had been completed as contemplated by the plans and specifications under the original contract.

§ 635.129 Record of materials, supplies, and labor.

(a) The provisions in this section are required to facilitate FHWA's efforts to compile data on Federal-aid contracts for the establishment of highway construction usage factors.

(b) On all Federal-aid primary, urban, and Interstate System contracts, except those which provide solely for the installation of protective devices at railroad crossings, those which are constructed on a force account or direct labor basis, highway beautification contracts, and contracts for which the total final construction cost for roadway and bridge is less than $1,000,000 the SHA's shall require the contractor:

(1) To become familiar with the list of specific materials and supplies contained in Form FHWA–47, "Statement of Materials and Labor Used by Contractors of Highway Construction Involving Federal Funds," prior to the commencement of work under this contract;

(2) To maintain a record of the total cost of all materials and supplies purchased for and incorporate in the work, and also the quantities of those specific materials and supplies listed on Form FHWA–47, and in the units shown;

(3) To furnish, upon the completion of the contract, to the SHA on Form FHWA–47 together with the data required in paragraph (b)(2) of this section relative to materials and supplies a final labor summary for all contract work indicating the total hours worked and the total amount earned.

(c) Upon receipt from the contractor, the SHA shall promptly transmit the Form FHWA–47 to the Division

Administrator in accordance with the instructions printed in the form.

(Approved by the Office of Management and Budget under control number 2125–0033)

§ 635.130 Payroll, weekly statement, and final labor certificate.

(a) For all projects, copies of payrolls and statements of wages paid, filed with the State as set forth in the required contract provisions for the project, are to be retained by the SHA for the period set forth in 23 CFR Part 17 for review as needed by the FHWA, the Department of Labor, the General Accounting Office, or other agencies.

(b) Upon completion of the contract, the contractor shall submit to the SHA contracting officer, for transmission to the FHWA with the voucher for final payment for any work performed under the contract, a certificate concerning wages and classifications for laborers, mechanics, watchmen, and guards employed on the project, in the following form:

The undersigned contractor on

_____

(Project No.)

hereby certifies that all laborers, mechanics, apprentices, trainees, watchmen, and guards directly employed or employed by any subcontractor performing work under the contract on the project have been paid wages at rates not less than those required by the contract provisions, and that the work performed by each such laborer, mechanic, apprentice, trainee, watchmen, or guard conformed to the classifications set forth in the contract or training program provisions applicable to the wage rate paid.

Signature and title: _____

(Approved by the Office of Management and Budget under control number 1215–0140)

Technical Amendment

Due to the removal of Form PR–1273 from 23 CFR Part 633, Subpart A, Appendix A, and redesignation of the form as Form FHWA–1273, it is necessary to make a minor technical correction to the footnote in another part of Title 23, CFR, as follows:

PART 230—[AMENDED]

4. The authority citation for 23 CFR Part 230 continues to read as follows:

Authority: 23 U.S.C. 140 and 315; E.O. 11246; 49 CFR 1.48(b)(24), unless otherwise noted.

§ 230.204 [Amended]

5. Part 230, Subpart B is amended by revising footnote number one in § 230.204 to read as follows:

[1] Form FHWA–1273 is available for inspection and copying at the locations given in 49 CFR Part 7, Appendix D, under Document Inspection Facilities and at all State highway agencies.

[FR Doc. 87–22527 Filed 10–1–87; 8:45 am]

BILLING CODE 4910-22-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 936

Surface Mining Control and Reclamation Act; Return of Full Regulatory Authority to the State of Oklahoma

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Final rule.

SUMMARY: In accordance with the provisions of 30 CFR 936.19, OSMRE is announcing the Director's decision to terminate direct Federal enforcement of the Oklahoma permanent regulatory program, hereinafter referred to as the Oklahoma program, and to return full authority to the State of Oklahoma. Since Oklahoma has met the requirements for restoration of full authority, this notice also amends 30 CFR Part 936 to delete those portions which address direct Federal enforcement of parts of the State program, the remedial actions required of the State to regain full authority and the requirements and procedures for terminating direct Federal enforcement.

EFFECTIVE DATE: October 2, 1987.

ADDRESSES: Copies of the Director's decision and the administrative record documents referred to in this notice are available for public inspection and copying during regular business hours at:

Office of Surface Mining Reclamation and Enforcement, Room 5131, 1100 "L" Street NW., Washington, DC 20240, Telephone: (202) 343–5492.

Office of Surface Mining Reclamation and Enforcement, Tulsa Field Office, 5100 E. Skelly Drive, Suite 550, Tulsa, OK 74135, Telephone: (918) 581–6430.

Oklahoma Department of Mines, Suite 107, 4040 N. Lincoln, Oklahoma City, OK 73105, Telephone: (405) 521–3659.

FOR FURTHER INFORMATION CONTACT: Jack Carson, (918) 581–6430.

SUPPLEMENTARY INFORMATION:

I. Background

On January 19, 1981, the State of Oklahoma received conditional approval of its permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). On March 10, 1983, the Director of OSMRE notified the Governor of Oklahoma that OSMRE had reason to believe that serious problems existed in the implementation of Oklahoma's approved regulatory program. After a public hearing and opportunity for public comment, the Director found that the Oklahoma Department of Mines (ODM) was not adequately implementing certain aspects of its approved program. On April 12, 1984, the Director of OSMRE, in accordance with the provisions of 30 CFR 733.12(f), announced his decision, effective April 30, 1984, to institute direct Federal enforcement of those parts of Oklahoma's program that the State had not adequately enforced and to restrict funding of the State's abandoned mine lands reclamation (AMLR) program until regulatory program improvements were made (49 FR 14674). The Director also outlined the process by which the State could regain full authority for its inspection and enforcement program.

On May 15, 1985, Oklahoma submitted a permitting plan and inspection and enforcement plan in partial satisfaction of these requirements (Administrative Record No. OK–666). After considering these documents, the progress made by the State in resolving other deficiencies, and accomplishing the remedial measures required in 30 CFR 936.18, and comments received from the public, the Director decided to initiate a phased return of inspection and enforcement authority to the State.

In the December 2, 1985, **Federal Register** announcing this decision, as codified in 30 CFR 936.17, 936.18, and 936.19, the Director established requirements and a schedule for full resumption of program authority by the State of Oklahoma and withdrew restrictions on the AMLR program (50 FR 49376). The Director based his decision, in part, on the agreement of ODM to officially submit detailed information on its policies, procedures, guidelines and forms, and on its plans and commitments to address the backlog of bond forfeiture actions and injunctive relief proceedings. As specified in 30 CFR 936.17(b), upon satisfactory submission of the above items, OSMRE agreed to return inspection and enforcement authority to ODM, for all mines where mining had